

JUL 8 1976

No. 75-1548

MICHAEL RODAK, JR., CLERK

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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**RICHARD WIENER, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE SECOND CIRCUIT**

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**MEMORANDUM FOR THE UNITED STATES  
IN OPPOSITION**

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**ROBERT H. BORK,**  
*Solicitor General,*  
*Department of Justice,*  
*Washington, D.C. 20530.*

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Petitioner contends that a portion of the district court's jury instructions prejudiced the jury concerning the credibility of a government witness.

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of conspiring with Stephen Silverman to distribute and to possess with intent to distribute Schedule I controlled substances (hashish), of possessing hashish with intent to distribute, and of possessing marijuana, in violation of 21 U.S.C. 841(a)(1), 844(a) and 846. He was sentenced to two years' imprisonment on each of the hashish offenses, and six months' imprisonment on the marijuana offense, the sentences to run concurrently, to be followed by two years' special parole; he was also

fined \$2,500 on each of the first two offenses, with the fines to be cumulative. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial, the sufficiency of which petitioner did not contest below and does not challenge here, showed that petitioner enlisted the aid of co-defendant Stephen Silverman in a plan to sell 800 pounds of hashish (Tr. 156),<sup>1</sup> and that Silverman acted as an intermediary in the sale of 40 pounds of hashish for \$26,000 (Tr. 60, 120, 156-159, 164-172). When agents searched petitioner's apartment pursuant to his consent, they found a pound of marijuana and a loaded pistol (Tr. 62).

Petitioner complains about a portion of the court's charge to the jury in which the court referred to co-conspirator Silverman (Tr. 502-503):

Now, ladies and gentlemen, you have this man before you and it is up to you to judge his testimony under the standards that I have expressed to you. I don't know how you are going to come out with respect to his testimony and, as I say, I do not wish to make any suggestions to you whatever, but I do say this: That regardless of how he comes out, Silverman is an extremely intelligent person. He considered every question that was put to him very carefully and he articulated his responses with consummate care and I respectfully suggest that regardless of what else he may be he is a very intelligent person.

Petitioner claims that this comment undercut his argument that Silverman was mentally unstable and was

<sup>1</sup>"Tr." references are to the trial transcript of proceedings on April 15-18, 1975.

not a credible witness (Pet. 3). This contention was properly rejected by the court of appeals (Pet. App. 6a-7a and n. 5).

As the court of appeals pointed out, the remark about Silverman was preceded by a long explication regarding the credibility of witnesses (Tr. 492-496), including the following pointed reference to Silverman (Tr. 494):

A man with a college degree and who is perfectly articulate and speaks with an Oxonian accent can be a liar.

The judge then gave a lengthy and complete instruction on the dangers of accomplice testimony, cautioning the jury in detail about Silverman's motivation for lying (Tr. 498-500). Only after all this did he make the comment about Silverman's intelligence and articulateness on the witness stand. When petitioner objected to this comment, the judge gave a supplemental instruction, again emphasizing Silverman's motives for lying (Tr. 517):

Now, on Silverman, this Stephen Silverman. Obviously he had a motive to lie. He had more than one motive to lie. He had as many motives to lie as he had federal offenses that he had committed and he admitted on the stand any number of offenses that he committed, if you accept his statements about the wheeling and dealing in hashish.

If you think he lied and you didn't get the truth from him, that is your privilege and your duty, but please, don't permit me to govern your fact-finding conclusions in any way.

In light of the court's charge as a whole (*United States v. Park*, 421 U.S. 658, 674-675), the challenged comment was not prejudicial. It cannot be presumed that the jury

equated intelligence with truthfulness. Indeed, the court suggested that the two traits do not necessarily go hand-in-hand: in the portion of the charge about which petitioner complains, the court stated that Silverman was intelligent "regardless of what else he may be" (Tr. 503). Moreover, the court prefaced the comment by stating "I did not wish to make any suggestions to you" (*ibid.*), a point reiterated in the supplemental instructions when the court said "don't permit me to govern your fact-finding conclusions in any way" (Tr. 517). The court did not say that it considered the witness credible, or that the jury should find him so. Under these circumstances, the passing comment on the witness' intelligence and ability to articulate, which must have been obvious to the jury in any event, could not have prejudiced the jury's consideration of the witness' credibility.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

JULY 1976.